No. 268.

Brief of Pierce & Williams for P. E.

268

No. 790.

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IN THE

United States Supreme Court.

S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane and F. R. Coudert, as Receivers of The Union Pacific Railway Company,
Plaintiffs in Error,

vs.

The City of Kansas City, Kansas, et al.,
Defendants in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR PLAINTIFFS IN ERROR.

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vs.
The City of Kansas City, Kansas, et al.,
Defendants in Error.

No. 790
Oct. Term,
1898.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

Upon the tenth of March, 1891, the Legislature of Kansas passed an act authorizing cities of the first class to take certain property within their limits, and providing the method for so doing.

That act reads as follows (Chapter 74, Laws of 1891):

"CITIES OF THE FIRST CLASS.

"An act relating to certain cities of the first class, and the adding thereto certain adjoining territory.

"*Be it enacted by the Legislature of the State of Kansas.*

"Section 1. That whenever any territory adjoining or touching the city limits of any city of the first class having a population of 30,000 inhabitants or more shall be subdivided into lots and blocks, or whenever any unplatted tract of land shall lie upon or mainly within any such city, or is so situated as to be bounded on three-fourths of its boundary line by platted territory of or adjacent to such city, or by the boundary line of such city or by both, the same may be added to and made a part of the city by ordinance duly passed; which ordinance shall describe the territory by giving the name of the subdivision or addition as platted, and by giving the metes and bounds of such unplatted tract, or by giving the metes and bounds of each tract and plat so taken in separately, or of the entire tract or tracts so taken in, with the section, town, range and county in which the same is located, without further proceedings; *but nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation.* Any other territory adjoining such city, whether platted or unplatted, may be added to and made a

part of the city in the following manner: The city attorney shall prepare an ordinance describing the territory to be added to and made a part of the city, giving the name of the owner, if known, and if the name of the owner is unknown, then the words 'owner unknown' shall follow such description. After such ordinance has been presented to the mayor and council, they shall fix a time not less than fifteen days nor more than thirty days from the date of the presentation of the ordinance when all parties affected by the passage of such ordinance may be heard before the mayor and council. After the time is fixed for such hearing, the city marshal shall serve a written or printed notice on all of the resident owners of unplatted territory embraced in such ordinance. Such notice shall be served by the city marshal in the same manner as a summons in a civil action before a justice of the peace. If any of the owners of any unplatted territory affected by such ordinance are non-residents of the county, or reside beyond the State, then the city clerk shall give notice by publication for ten days in some paper published in such city, and having a general circulation in the county in which said city is situated, giving a description of such unplatted tracts and a statement that they are included in such proposed ordinance, and stating when and where all parties interested may be heard. The first publication of said notice shall not be less than eight days, and the last publication thereof shall not be more than twenty-two days after the presentation of such ordinance. No notice whatever shall be necessary to the owners of platted territory. At any time after the expiration of thirty days, after the presentation of such ordinance, and after parties interested shall have opportunity to be heard as aforesaid, the mayor and council may

pass such ordinance, and cause the same to be published in the city official paper. Within thirty days after such publication the mayor of such city shall file in the office of the clerk of the district court of the county in which such city is situated a copy of said ordinance and the service of notices duly certified by the clerk of said city under the seal of the city, and also therewith due proof showing the publication of said ordinance. Thereupon said court shall consider said ordinance, and by its judgment either approve, disapprove or modify the same, first hearing all objections, if any, and proofs, if any, offered the said city or persons affected by said ordinance. Should said ordinance be approved or modified by said court, then the limits or area of said city shall be enlarged or extended as therein designated from the date of such approval or modification; but should it be disapproved entirely, then the limits or area of the city shall remain unaffected by said proceedings. But should the same be approved entirely, or modified or approved, the judgment of such court shall stand and the limits of such city shall be extended as in said judgment specified; and such judgment shall be final and conclusive upon all persons, companies and corporations, and in all courts, as to the limits or area of such city as thus enlarged or extended. The district court shall make a record of all findings and determinations in the premises, which shall be conclusive evidence of the facts so found and determined; and after the disapproval or modification of one ordinance, another or others may be passed and acted on in like manner and upon the notice.

"Sec. 2. That so much of section one of chapter ninety-nine of the Session Laws of 1887, relating to cities of the first class, and all other acts and parts of acts in so far as the same are in con-

flict with the provisions of this act, are hereby repealed.

"Sec. 3. This act shall take effect and be in force from and after its publication in the official State paper.

"Approved March 10, 1891.

"Published in the official State paper April 2, 1891."

On March 8, 1892, the city council of Kansas City, Kansas, in pursuance of the above statute, extended the city boundaries so as to include large tracts of land belonging to the Union Pacific Railway Company. A portion of those lands were used for right of way and other railroad purposes, and a large part of them were vacant and unoccupied lands held by the railway company for its future emergencies. The ordinance extending the city boundaries reads as follows (record, page 14):

"ORDINANCE No. 2163.

"An ordinance adding certain lands therein described known as the Union Pacific lands to and making the same a part of the city of Kansas City, Kansas.

"Whereas, A certain unplatted territory belonging to the Union Pacific Railroad Company lies upon and mainly within the city of Kansas City, Kansas, and is so situated as to be bounded on three-fourths ($\frac{3}{4}$) its boundary line by platted territory of, and adjoining to said city; which said railroad land, by virtue of its location, enjoys the

benefits of said city without sharing its burdens; now, therefore,

"*Be it ordained by the Mayor and Councilmen of The City of Kansas City, Kansas:*

"Section 1. That the following described territory, to wit: Commencing at the northeast corner of the southeast quarter ($\frac{1}{4}$) of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte County, Kansas, thence south forty (40) poles, thence east to the Kansas river, thence down the same to the prolongation of the east and west center line of said section fifteen (15), thence west to beginning.

"Also commencing at the northeast corner of the southeast quarter ($\frac{1}{4}$) of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte County, Kansas, thence west to the center line of said section fifteen (15), thence north eighty (80) poles, thence west fifty-seven (57) poles, thence south to the southerly line of Fifth Street in the original townsite of Armstrong, thence along the southerly line of Fifth Street to its intersection with the southerly line of Muncie boulevard, thence westerly along the southerly line of Muncie boulevard to the west line of said section fifteen (15), thence south to the southwest corner of the southwest quarter ($\frac{1}{4}$) of section fifteen (15), thence east eighty (80) poles, thence north fifty-two (52) poles, thence east eighty-five (85) poles, thence north twenty-eight (28) poles, thence east eight (8) poles, thence north one hundred ninety-nine (199) feet, thence east three hundred fifty-five and eight-tenths (355.8) feet to the east line of Third Street, in McAlpine's addition, thence north one hundred sixty (160) feet, thence east two hundred seventy-five (275) feet to the center line of Second Street in McAlpine's addi-

tion, produced, thence north one hundred thirty (130) feet, thence east three hundred fifteen (315) feet to the prolongation to the center line of First Street in McAlpine's addition, thence north one hundred thirty-two and eight-tenths (132.8) feet, thence east to the east line of said section fifteen (15) thence north forty (40) poles to beginning.

"Also commencing at a point where the northerly line of the Union Pacific Railway Company's right of way intersects the east line of section sixteen (16), township eleven (11), range twenty-five (25) east, in Wyandotte County, Kansas, thence northwesterly along said northerly line of the right of way of the Union Pacific Railway, to the west line of said section sixteen (16), thence south along the west line of said section sixteen (16), about one hundred (100) feet to the southerly line of the right of way of the Union Pacific Railway; thence southeasterly along the southerly line of said right of way to the east line of said section sixteen (16), thence north about one hundred (100) feet to the beginning.

"Said tracts being contiguous and containing in the aggregate one hundred and seventy-two (172) acres, be and hereby is added to and made a part of the city of Kansas City, Kansas.

"Section 2. This ordinance shall take effect and be in force from and after its passage and publication in the Kansas City Gazette.

"Passed in council March 8th, 1892.

William Albright, City Clerk.

"Approved March 11th, 1892.

Thomas F. Hannan, Mayor.

"Published March 11th, 1892."

After the passage of this ordinance the tax levies of the city were extended against the property

so attempted to be taken within its limits, and the receivers of the railway company brought this action for the purpose of enjoining their collection. The collection of the taxes was enjoined, upon the ground that the statute above referred to, under which the ordinance was passed taking the property into the city, was unconstitutional and void, in that it violated that portion of the Fourteenth Amendment to the Constitution of the United States, which provides:

"Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It was also contended by the receivers of the railway company that the statute was unconstitutional, in that it was in conflict with certain provisions of the State Constitution, which contention is, of course, immaterial in this court. The conflict of the statute with the Constitution of the United States was directly raised in plaintiffs' petition (see record, page 7). The allegations of the petition in respect to this particular matter read as follows:

"And plaintiffs are advised, and so charge the fact to be, that in so far as said statute attempts to authorize the taking of said lands within the limits of Kansas City, Kansas, as attempted in said or-

dinance, exhibit 'A,' it is unconstitutional, null and void, in this, to wit:

"That by reason of that portion of the act which excepts from its operation any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation, it is in violation of that part of the Fourteenth Amendment to the Constitution of the United States which reads as follows: 'Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' "

The defendants filed a general demurrer to the petition of the receivers (see record, page 21). The demurrer was overruled, and the defendants electing to stand upon it, a perpetual injunction was granted in favor of the receivers as prayed for in the petition (see record, page 24). Thereupon the case was taken by the City of Kansas City, Kansas, and the other defendants in the lower court, to the Supreme Court of the State of Kansas, where the judgment of the lower court was reversed and an order made directing that court to sustain the demurrer to the petition. The only question presented to the Supreme Court of Kansas was as to the constitutionality of the statute. That court held that the law violated neither the Federal nor the State Constitution. The decision of the Supreme Court of Kansas is

reported in 59 Kan. 427. It may be found on page 29 of the record.

The Receivers of the Union Pacific Railway Company thereupon brought the case to this court on a writ of error.

This court held that the judgment of the Supreme Court of Kansas was not final and therefore not subject to review.

Clark vs. Kansas City, 172 U. S. 334.

After the mandate of this court was received by the Supreme Court of Kansas the case went back to the Court of Common Pleas of Wyandotte County with directions to sustain the demurrer to plaintiffs' petition (see record, page 27). A copy of the opinion of the State Supreme Court accompanied its mandate.

When the case reached the Court of Common Pleas, its former judgment was set aside and the plaintiffs having elected to stand upon their petition without making any amendment thereto, the demurrer to the petition was, on February 20, 1899, sustained, and final judgment entered (record, page 32).

The plaintiffs thereupon took the case on error, to the Supreme Court of Kansas, where, on April 6, 1899, the judgment of the lower court was

affirmed. The journal entry of the court's judgment may be found on page 48 of the record, and, omitting caption, reads as follows:

Journal Entry of Judgment in State Supreme Court.

"Upon this 6th day of April, 1899, this cause comes on for hearing upon the motion of certain defendants in error to dismiss the appeal of plaintiffs in error.

"And it appearing that this court has heretofore in this action, to wit, in case number 10,571, *The City of Kansas City, Kansas, et al., plaintiffs in error, vs. S. H. H. Clark et al., defendants in error*, in this court, and on the 11th day of June, 1898, said action being between the same parties as are plaintiffs in error and defendants in error in this action, and upon the same pleadings and involving the same subject-matter and the same question and none other, to wit, whether chapter 74 of the Session Laws of Kansas for 1891 is in conflict with the Fourteenth Amendment to the Federal Constitution, duly ordered and adjudged that the petition of plaintiffs in error in this case did not state facts sufficient to constitute a cause of action, and did order and adjudge that the demurrer of the defendants in error named in this action be sustained to said petition, a copy of the opinion of this court in said case being included in and made a part of the record on this appeal, in pursuance of which decision and judgment in this court the Court of Common Pleas of Wyandotte County, Kansas, has heretofore entered an order sustaining said demurrer, and has rendered a final judgment in accordance with the mandate and opinion of this court; and it appearing that the appeal from the decision of this court in said case number 10,571 to the Supreme Court

of the United States was dismissed by that court upon the ground that the judgment appealed from was not a final one, and it further appearing that final judgment has since been entered herein, and that plaintiffs in error desire to appeal therefrom to the Supreme Court of United States for the purpose of reviewing the decision of this court.

"It is therefore ordered and adjudged, for the reasons given in said opinion, that the judgment of the Court of Common Pleas of Wyandotte County be, and the same is hereby affirmed.

"It is by the Court further considered, ordered and adjudged that the defendants in error do have and recover of and from the plaintiffs in error their costs herein, taxed at twenty dollars; to which rulings and judgment of the Court plaintiffs in error duly except.

"Upon application of plaintiffs in error, and that there may be no question as to the opinion of this court heretofore rendered herein being a part of the record on this appeal, it is by the Court ordered that the copy of said opinion included in and made a part of the transcript from the Court of Common Pleas of Wyandotte County, Kansas, be, and the same is hereby declared to be a part of the record of this Court in this case.

"It is by the Court further ordered, upon application of plaintiffs in error, that the judgment of this court rendered in said case number 10,571 upon the 11th day of June, 1898, reversing the judgment of the lower court and directing that the demurrer to plaintiffs' petition be sustained, be, and the same is hereby made a part of the record in this case, and the clerk of this court is hereby directed to make and attach to the record herein a certified copy of said judgment."

It will thus be seen that the State Supreme Court decided the case upon the same grounds that it was decided upon in the former hearing and that the opinion of the court in the first hearing was made the opinion of the court in the last one and declared to be a part of the record in the case.

The Receivers of the Union Pacific Railway Company thereupon sued out a writ of error to this court, and present for consideration precisely the same question sought to be raised by them upon their former appeal, which is, as to whether the statute in question is in conflict with the Fourteenth Amendment to the Constitution of the United States. That question is directly raised by plaintiffs in error by their several assignments of error set out on pages 52 and 53 of the record. The same errors are assigned in this brief, and are as follows:

Errors Assigned.

First. The Supreme Court of the State of Kansas erred in affirming the judgment of the lower court.

Second. The Supreme Court of the State of Kansas erred in failing and refusing to reverse the judgment of the lower court.

Third. The Supreme Court of the State of Kansas erred in holding that these plaintiffs in error could not complain of the fact that chapter 74 of the Session Laws of Kansas for 1891, being an act entitled

"An act relating to certain cities of the first class and the adding thereto certain adjoining territory,"

was in violation of that part of the Fourteenth Amendment to the Federal Constitution, which reads as follows:

"Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Fourth. The Supreme Court of the State of Kansas erred in failing and refusing to hold that chapter 74 of the Session Laws of Kansas for 1891, being an act entitled

"An act relating to certain cities of the first class and the adding thereto certain adjoining territory,"

was in violation of that part of the Fourteenth Amendment to the Federal Constitution, which reads as follows:

"Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth. The Supreme Court of the State of Kansas erred in refusing to hold that the exception contained in chapter 74 of the Session Laws of Kansas for 1891, being an act entitled

"An act relating to certain cities of the first class and the adding thereto certain adjoining territory,"

did not bring said act within the inhibition of that part of the Fourteenth Amendment to the Federal Constitution which reads as follows:

"Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,"

the exception in said statute herein referred to being as follows:

"But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation."

Sixth. The Supreme Court of the State of Kansas erred in holding that said chapter 74 of the Session Laws of Kansas for 1891, being an act entitled

"An act relating to certain cities of the first class, and the adding thereto certain adjoining territory,"

was and is valid in so far as these plaintiffs in error are concerned and binding upon them.

Seventh. The Supreme Court of the State of Kansas erred in holding that the action of the City of Kansas City, in taking within its limits the property of the Union Pacific Railway Company under the provisions of chapter 74 of the Session Laws of Kansas for 1891, being an act entitled

"An act relating to certain cities of the first class and the adding thereto certain adjoining territory,"

was legal, and that the tax levies of said city extended against said property were valid.

ARGUMENT.

Chapter 74 of the Session Laws of Kansas for 1891 is Unconstitutional and Void, for the Reason that it Arbitrarily Excludes from its Operation Agricultural Lands Owned by Individuals, and Includes all Other Classes of Property.

The act in question is vitiated by the exception found in the last part of section 15, as the same appears on page 339, volume 1, General Statutes of Kansas, 1897, which reads as follows:

"*But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation.*"

This provision of the act means that agricultural lands, *when owned by individuals*, shall not be subject to its provisions.

The statute under consideration, therefore, divides property into two general classes, one of which is subject to its provisions and the other is not. In the one class comes agricultural lands owned by individuals. In the other class comes agricultural lands owned by corporations, lands used for manufacturing and railroad purposes, vacant lands held for speculative purposes; in short, all lands not included in the excepted class.

The law is void because it arbitrarily singles out agricultural lands *owned by individuals*, and exempts them from burdens imposed upon all other classes of property.

The discrimination thus made is obvious. A corporation owns a tract of land used for agricultural purposes, located in the vicinity of a city of the first class. This land is subject to the provisions of the act and may be taken within the confines of the city. An individual owns a tract of land used for agricultural purposes, located precisely similar to the tract owned by the corporation, but such land is not subject to the provisions of the act and can not be taken into the city. The

individual sells his land to the corporation and it becomes subject to the law. The corporation sells its land to the individual and the law no longer applies.

Again, an individual owns several hundred acres of land, situated near a city of the first class; it is vacant and unoccupied, and of such a character that it is not suitable for agricultural purposes. The owner holds it with the expectation that it may become valuable for manufacturing or other similar purposes. This land may be taken into the city. Another individual owns an acre of ground similarly situated, but used for agricultural purposes. His land can not be taken into the city.

Another illustration: John Jones owns a tract of land consisting of two hundred acres, located adjacent to a city of the first class, which is used in the manufacture of brick. He selected this spot because it was not included within the limits of the city and close enough thereto to enable him to successfully carry on his business. He has no desire to have his property incorporated within the limits of the city. In fact, if that should be done the added burdens of taxation would make it impossible for him to successfully carry on his brick business in that location, and he would be

compelled in self-protection to seek another situation. Under the provisions of the act in question, his property might be taken within the limits of the city by the mere passage of an ordinance, regardless of his protests. On the other hand, Peter Smith might own a small parcel of land similarly situated, of less than an acre in extent, upon which he raised a few vegetables each year, but his land could not be taken into the city under the act in question, simply because it was used for agricultural purposes.

A railroad company may also own large tracts of unoccupied land located in the neighborhood of a city of the first class. The land may be held in anticipation of the growing needs of the company. This property can be brought into the city over the protests of its owner, while a plat of ground 100 feet square used for agricultural purposes may remain outside.

It will be observed in connection with this matter that the discrimination against lands *not* used for agricultural purposes is as great as the discrimination against lands owned by corporations and *used* for agricultural purposes; the test being whether the land can, or can not be taken into the city, and as most of the lands in Kansas are used for

agricultural purposes and are generally owned by individuals, it follows that the lands affected by the act are probably much smaller in area than those excepted from its operation.

No good reason can be given for these discriminations. They result entirely from the exercise of arbitrary power upon the part of the Legislature.

The Discrimination is Substantial.

That the discrimination is substantial is apparent. Property located within the limits of a city is subject to additional taxation for the support of the city government; to special assessments for the construction of sewers and the paving of streets; to the law of eminent domain as exercised by cities of the first class, and to that portion of such law which provides for the assessment of damages and benefits for the purpose of opening and improving streets; to the various police regulations which may be imposed by a city, which may prevent the free use of one's property. For instance, a regulation such as exists in the city of Leavenworth, which prevents trains from running at a speed exceeding three miles per hour.

It is true that there are benefits which are supposed to flow from the location of property within the boundaries of a city, and many owners would

prefer to have their property located within rather than without a city. But the fact nevertheless remains that the bringing of a piece of real estate within the confines of a city carries with it onerous burdens which many property owners are anxious to avoid. The statute under consideration recognizes this fact by giving to owners of certain classes of property the right to protest against the annexation as well as the right to have the question as to whether the property shall be taken into the city judicially determined in the district court.

The Power of the Legislature to Make Classifications.

It is urged, however, that the exception made in favor of agricultural property owned by individuals does not make the act void, because the Legislature has the power to make classifications; that when an act applies equally to all persons or properties included within the various classifications made by it, the legislation is valid.

The Classification Must be Reasonable.

We concede that the Legislature has the power to make classifications and that it may have the power to classify the different kinds of property

which may be taken within the limits of a city; but such classification must be reasonable. It can not be purely arbitrary. For instance, the Legislature would have no right to say that all tracts of land owned by individuals named Jones could be taken within the limits of an adjoining city, but that this could not be done with tracts of land similarly situated and owned by individuals named Smith. The Legislature would have no power to authorize a city to collect a license tax from all redheaded men engaged in business within its limits, exempting at the same time men with different colored hair. This idea is very lucidly set forth by Mr. Justice Brewer in the case of *Gulf, etc., Rld. Co. vs. Ellis*, 165 U. S. 155, and we use his language:

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, * * * yet it is equally true that such classification can not be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions

which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

"As well said by Black, J., in *State vs. Loomis*, 115 Missouri, 307, 314, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employés any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void. 'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the Legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism and therefore not the law of the land.'

"In *Vanzant vs. Waddell*, 2 Yerger, 260, 270, Catron, J. (afterwards Mr. Justice Catron of this court), speaking for the Supreme Court of Tennessee, declared: 'Every partial or private law which directly proposes to destroy or affect indi-

vidual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another.'

"In *Dibrell vs. Morris' Heirs*, Supreme Court of Tennessee, 15 S. W. Rep. 87, 95, Baxter, Special Judge, reviewing at some length cases of classification, closes the review with these words: 'We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary.' "

Judge Cooley's opinion upon this subject, as expressed in his work on Constitutional Limitations, page 393, is as follows:

"The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects should be based upon some reason which renders them important—like the want of capacity in infants and insane persons; but if the Legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due

bounds of legislative power, even if it did not come in conflict with express constitutional provisions. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of *liberty* in particulars of primary importance to his or their 'pursuit of happiness.' "

The Classification Made, of Agricultural Lands Owned by Individuals, is Unreasonable and Arbitrary.

We may admit, for the sake of argument, that sufficient reasons exist to justify the Legislature in exempting lands used for agricultural purposes from statutes providing for the enlargement of city boundaries. Furthermore, that the discrimination in favor of agricultural lands in the act under consideration would have been perfectly valid provided all agricultural lands had been excepted. But the trouble with the exception is that it only includes agricultural lands owned by individuals. The Legislature saw no objections to including agricultural lands within the limits of a city of the first class. The act expressly provides that such lands may be taken within the limits of a city provided they are owned by corporations. It is only when the agricultural lands are owned by individuals that the exception ap-

plies. This demonstrates that the mere fact of the lands being used for agricultural purposes affords no good reason, in the estimation of the Legislature, for excluding them from cities of the first class.

How can the conclusion be avoided, then, that the classification sought to be made in favor of agricultural lands owned by individuals is a purely arbitrary one? It has no reasonable basis to stand upon. The Legislature might just as well have said that all land belonging to John Doe should be excepted from the provisions of the act, or that all tracts of land having a red school house in the southeast corner and a white church in the northwest corner should not be affected by it. As to whether the exception is to apply to agricultural lands, or not, depends upon the question of ownership. Individuals owning such lands are favored; corporations owning similar lands are discriminated against. Therefore, the classification sought to be made is arbitrary, and not within the constitutional power of the Legislature.

In the case of *Santa Clara County vs. Southern Pac. Ry. Co.*, 18 Federal Reporter, 385, opinion by Mr. Justice Field, a statute of the State of California was condemned because it distin-

guished between corporations and individuals as to the uniformity of taxation. In the course of the opinion (page 394), Justice Field used the following language, which we desire to adopt as a part of our argument in this connection:

"Instances of every day occurrence will show the effect of this discrimination in a clear light. A natural person and a railroad company own together a parcel of property in equal proportions, subject to a mortgage. In estimating the value of the undivided half belonging to the natural person, half of the amount of the mortgage is deducted. In estimating the value of the undivided half belonging to the railroad company, no part of the mortgage is deducted. *The discrimination is made against the company for no other reason than its ownership.* Take another instance: A natural person and a railroad company own tracts of land adjoining each other, of the same quantity, and of equal fertility and richness, both being subject to a mortgage. In the estimate of the value of the property belonging to the natural person the amount of the mortgage is deducted; in the estimate of the value of the property belonging to the railroad company the mortgage is not deducted. Of course, the valuation of the latter and consequent tax is proportionately increased, *and this discrimination is made solely because of the ownership of the property.* Should these two owners exchange their lands, the valuation made would change with the ownership. Should the railroad company sell its tract to an individual, the assessing officers would at once be bound to return a different valuation of the property as a basis for taxation. *Every one sees that the valuation has not in fact changed with the ownership, and*

therefore that the discrimination is made solely because a rule is adopted in the assessment of the property of one party different from that applied in the assessment of the property of the other, purely on account of its ownership. * *

"The principle which sanctions the elimination of one element in assessing the value of property held by one party, and takes it into consideration in assessing the value of property held by another party, would sanction the assessment of the property of one at less than its value—at a half or a quarter of it—and the property of another at more than its value—at double or treble of it—according to the will or caprice of the State. *Today railroad companies are under its ban, and the discrimination is against their property. Tomorrow it may be that other institutions will incur its displeasure.* If the property of railroad companies may be thus sought out and subjected to discriminating taxation, so, at the will of the State, by a change of its Constitution, may the property of churches, of universities, of asylums, of savings banks, of insurance companies, of rolling and flouring mill companies, of mining companies, indeed, of any corporate companies existing in the State. The principle which justifies such a discrimination in assessment and taxation, where one of the owners is a railroad corporation and the other a natural person, would also sustain it where both owners are natural persons. A mere change in the State Constitution would effect this if the Federal Constitution does not forbid it. *Any difference between the owners, whether of age, color, race or sex, which the State might designate, would be a sufficient reason for the discrimination.* It would be a singular comment upon the weakness and character of our republican institutions if the valuation and consequent taxation of prop-

erty could vary according as the owner is white, or black, or yellow, or old, or young, or male or female. A classification of values for taxation upon any such ground would be abhorrent to all notions of equality of right among men. Strangely, indeed, would the law sound in case it read that in the assessment and taxation of property a deduction should be made for mortgages thereon if the property be owned by white men or by old men, and not deducted if owned by black men or by young men; deducted if owned by landsmen, not deducted if owned by sailors; deducted if owned by married men, not deducted if owned by bachelors; deducted if owned by men doing business alone, not deducted if owned by men doing business in partnerships or other associations; deducted if owned by trading corporations, not deducted if owned by churches or universities, and so on, making a discrimination whenever there was any difference in the character or pursuit or condition of the owner. To levy taxes upon a valuation of property thus made is of the very essence of tyranny, and has never been done except by bad governments in evil times, exercising arbitrary and despotic power."

We contend that the discrimination made in favor of agricultural lands owned by individuals and against all other classes of property brings the act within the inhibition of the Federal Constitution, unless the discrimination was one which the Legislature was authorized to make; that the discrimination was not within the limits of the legislative discretion, because it is based entirely upon the question of the ownership of the property;

that whether property happens to be owned by a corporation or by an individual affords no proper basis for exempting that property from the operation of laws which affect all other classes of property similarly situated; therefore, as the discrimination was not a proper one, that the law is unconstitutional and void

"Due Process of Law" and "The Equal Protection of the Laws."

It was to prevent discriminations and class legislation that the latter part of the Fourteenth Amendment to the Federal Constitution was passed. The words "Due process of law," and "The equal protection of the laws," had for centuries possessed a well known signification which became a part of the Constitution. They are synonymous with "The law of the land." They mean a law binding upon every member of the community under similar circumstances (*Wally's Heirs vs. Kennedy*, 2 Yerg. 554). They were intended to secure the individual from the arbitrary exercise of the powers of the government, unrestrained by the established principles of private rights and distributive justice (*Bank vs. Okely*, 4 Wheat. 235). They condemn arbitrary,

unequal and partial legislation (*State vs. Loomis*, 115 Mo. 307; 22 S. W. 351). They meant not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances (Mr. Justice Field in *County of Santa Clara vs. Rld. Co.*, 18 Fed. Rep. 398). The Fourteenth Amendment "suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others" (*Ex parte Virginia*, 100 U. S. 339).

"The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise odious individuals and corporations would be governed by one law, the mass of the community, and those who made the law, by another; whereas the like general law, affecting the whole community equally, could not have been passed. The idea of people, through their representatives, making laws whereby are swept away the life, liberty and property of one or a few citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom

has a name. Such abuses resulted in the adoption of the Magna Charta in England, which is, and for centuries has been, the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason of its adoption as a part of our Constituion."

Judge Catron in *Wally vs. Kennedy*, 2 Yerg. 555, and *Vanzant vs. Waddell*, id. 270.

Cases in which Statutes have been Held Void on Account of Making Arbitrary and Unreasonable Classifications.

The cases in which discriminations are condemned and the statutes containing them declared unco stitutional are numerous, and we will call the attention of the court to some of them.

In the case of *Gulf, Colorado & Santa Fe Ry. vs. Ellis*, 165 U. S. 150, an act of the State of Texas providing for the assessment of attorneys' fees in suits against railroad companies, arising upon claims for stock killed or injured, was held to be unconstitutional in that it singled out railroad companies and required them to pay such fees without compelling other corporations and individuals to pay them under similar circumstances.

In the case of *Low vs. Rees*, 41 Neb. 127 (59 N.W. 362), an act of the Nebraska Legislature

fixing eight hours as a day's labor for all classes of mechanics, servants and laborers, excepting those engaged in farm or domestic labor, was declared unconstitutional, first, by reason of the exception made in favor of farm and domestic labor, and second, because it interfered with the right to contract.

In the case of *State vs. Loomis*, 115 Mo. 307 (22 S.W. 350), an act of the Missouri Legislature which declared that all corporations or individuals engaged in manufacturing or mining should pay their employés in cash or the equivalent thereof, was held unconstitutional for the reason that it related only to persons engaged in manufacturing or mining enterprises, and had no application to persons engaged in other classes of business.

In the case of *State vs. Goodwill*, 33 W. Va. 179 (10 S. E. 285), the Supreme Court of West Virginia held that it was not competent for the Legislature under the Constitution to single out owners and operators of mines and manufacturers of every kind, and provide that they should bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it was competent for

other owners of property or employers of labor to make.

In the case of *Millett vs. People*, 117 Ill. 294 (7 N. E. 631), the Supreme Court of Illinois stated that the question involved therein was this:

"The question is thus presented whether it is competent for the general assembly to single out owners and operators of coal mines as a distinct class and provide that they shall bear burdens not imposed on other owners of property or employers of laborers, and prohibit them from making contracts which it is competent for other owners of property or employers of laborers to make."

The court then proceeded to answer the question in the negative.

In the case of *O'Connell vs. Menominee Bay Shore Lumber Co.*, 71 N. W. 449, it was held by the Supreme Court of Michigan that a statute which permitted the service of process in certain classes of cases in counties adjoining the one in which the action was brought was invalid because class legislation, in that it gave special privileges to suitors on specified classes of claims.

In the case of *Coal Co. vs. Rosser*, 53 Ohio St. 12, it was held that a statute providing for an attorney's fee *in actions for wages* was unconstitutional and void as being class legislation.

In the case of *City of Tacoma vs. Krech*, 15

Wash. 296 (46 Pac. 255), an ordinance prohibiting barbers from working on Sunday was declared void upon the ground that barbers were singled out and other persons exempted from its provisions.

In the case of *Janesville vs. Carpenter*, 77 Wis. 288, a statute authorizing suits for injunction to be maintained in favor of certain parties, under circumstances differing from those which obtained in respect to all other suits of a similar nature, was held to be void as discriminating and class legislation.

In *Lewis vs. Webb*, 3 Greenl. 326, the validity of a statute granting an appeal from a decree of the probate court in a particular case came under review. The court says:

"On principle it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just nor reasonable in its consequences. It is our boast that we live under a government of laws, and not of men; but this can hardly be deemed a blessing, unless those laws have for their immovable basis the great principles of constitutional equality. Can it be supposed for a moment that if the Legislature should pass a

general law, and add a section by way of proviso that it never should be construed to have any operation or effect upon the persons, rights, or property of Archelaus Lewis or John Gordon, such a proviso would receive the sanction or even the countenance of a court of law? And how does the supposed case differ from the present? A resolve passed after the general law can produce only the same effect as such proviso. In fact, neither can have any legal operation."

See also:

South & North Alabama Rld. vs. Morris, 64 Ala. 193, 199.

Chicago, St. L., etc., Rld. vs. Moss, 60 Miss. 641.

Wilder vs. Rld. Co., 70 Mich. 382.

Grand Rapids Chair Co. vs. Runnels, 77 Mich. 104.

Jolliffe vs. Brown, 14 Wash. 155.

San Antonio, etc., Ry. Co. vs. Wilson, (Tex.) 19 S. W. 910.

Atchison & Nebraska Rld. Co. vs. Baty, 6 Neb. 37.

Eden vs. People, 161 Ill. 296.

Froer vs. People, 141 Ill. 171.

Pearson vs. Portland, 69 Me. 278.

Los Angeles Gold Mine Co. vs. Campbell, 56 Pac. (Colo.) 246.

The Decision of The Kansas Supreme Court.

The Supreme Court of Kansas held that the law was not in conflict with the Fourteenth Amendment, upon the ground, first, that the Legislature in passing laws providing for the addition of territory to cities of the first class had the right to discriminate between different classes of property and could exclude agricultural lands from the operation thereof, while including all the other classes of property "having to the city like relations of situation, contiguity and otherwise." Second, that the discrimination made between individuals and corporations as the owners of agricultural lands was one which could only be taken advantage of by corporations owning agricultural lands. Therefore, that the plaintiffs could not be heard to complain of such discrimination, because it was not alleged in the petition that the lands of the Union Pacific Railway Company were used for agricultural purposes. Let us consider the arguments of the court upon these propositions.

First. As to the discrimination made by the statute between different classes of property.

We do not assent to the view that the Legislature has the power to make general laws with

respect to extending the boundaries of cities, and to exclude from the operation of such laws lands used for agricultural purposes, without reference to their size or extent, when such lands are in all respects similar to lands affected by the law, with the single exception that they are used for agricultural purposes. Under this aspect of the law, as soon as the use of the land changes, the application of the law changes with it. A piece of land occupied today with a dozen families who are engaged in tilling it, is exempt from the provisions of the statute. Tomorrow the same piece of land is abandoned and becomes entirely unoccupied, is no longer devoted to agricultural purposes, and is at once brought within the purview of the law. We can not believe that such discrimination is justifiable. But, conceding that it is, and that the views of the learned Chief Justice of the Supreme Court of Kansas who delivered the opinion of the court are correct upon this subject, still he fails to meet the precise point in issue. That point is, not whether the Legislature can discriminate between agricultural lands and all other classes of property similarly situated, but whether it can discriminate between agricultural lands *owned by individuals* and all other classes of property.

The reasons which might justify the Legislature in excluding agricultural lands from the operation of the law do not apply when the act itself *includes* agricultural lands. If the Legislature had been actuated by the reasons offered by the Supreme Court of Kansas in support of the discrimination made, the act would have excluded from its operations *all* agricultural lands. Agricultural lands owned by corporations must come in. Agricultural lands owned by individuals may stay out. The mere fact that the lands are used for agricultural purposes affords no objection to their being taken into a city. The objection only arises when such lands are owned by individuals. Is such a discrimination valid? We insist that it is not, and that the owners of property discriminated against have the right to call to their aid the provisions of the Federal Constitution to protect themselves against a legislative enactment which refuses to them the equal protection of the laws, and which permits their property to be taken without due process of law.

Pursuing the subject further, let us take for illustration a legislative enactment declaring all public auditoriums or buildings where people congregate for amusement, instruction or religious

worship, to be subject to inspection and various regulations, and requiring the owners thereof to pay a tax to cover the expenses of such inspection and regulation. The act contains a proviso in the following language:

"But nothing in this act shall be taken or held to apply to public auditoriums or buildings used for religious worship, exclusively, when the same are the property of or used by the Methodist Episcopal Church."

Here would be an act in which the necessity of inspecting and regulating public auditoriums and churches, is recognized by the Legislature, and in which churches, as a whole, are placed in the same class, so far as inspecting and regulating them is concerned, as public halls and opera houses. But it is so framed as to except from its operation the churches of a certain denomination, thereby discriminating against all other public auditoriums and buildings included in the statute. Will it be contended that such a discrimination is valid as against the owner of an opera house?

For another illustration let us suppose that the Legislature has passed an act levying an income tax upon all residents of the State. The act contains the following proviso:

"But nothing in this act shall apply to individ-

uals having an income of less than $3,000 per year, when such person is not in the employ of a railroad or other corporation, or engaged in professional, manufacturing or mercantile pursuits."

This act is so drawn as to except persons engaged in agricultural pursuits and having an income of less than $3,000 per annum, from its operation. It excludes other classes also, as the language used is necessarily general in its nature; but it was essential to exempt farmers with a limited income from the provisions of the law, or it would not have passed the Legislature. In order to make the exception effective, it was put in the form of a proviso as above set forth. Can it be said that this law does not discriminate against *all* persons who under the terms of the law are obliged to pay the tax?

It is but a few steps from the foregoing instances to a law levying a tax for general State purposes but containing a proviso, similar in form to those given above, so worded as to exclude from the operation of the law all persons who voted the people's party ticket at the last general election.

If exceptions similar to the one under consideration are valid, then those contained in the foregoing illustrations are valid also, and there would

seem to be no limitation to the legislative will when it desires to except certain individuals or corporations, or classes of individuals or corporations, from the operation of laws passed by it. For it is certainly not a difficult matter to so frame an exception as to make it of the same character as the proviso contained in the act in question. And if such provisos are legal, it is possible for the Legislature not only to except certain individuals from the operation of obnoxious laws, but also makes it possible for laws to be so limited in their operation by provisos as to arbitrarily include within their scope unpopular individuals or business concerns only.

Second. As to the right of plaintiffs in error to avail themselves of the discrimination made in favor of agricultural lands owned by individuals, and against all other classes of property.

The Supreme Court of Kansas held that plaintiffs in error were not in a position to avail themselves of the unconstitutionality of the act caused by the discrimination made in favor of agricultural lands owned by individuals. In support of its position the court cites Cooley on Constitutional Limitations (6th ed.), page 196. The law is there stated to be as follows:

"A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it."

But in this case the rights of the Union Pacific Railway Company are affected by the act complained of. Its lands are sought to be taken within the limits of a city and subjected to its burdens under the provisions of the very statute which we say is unconstitutional. The argument of the lower court necessarily assumes that the statute is unconstitutional by reason of the exception made between individuals and corporations owning agricultural lands, and holds that the railway company can not raise the question as to the constitutionality of the statute because its lands are not agricultural lands.

Here we have the anomalous position of a party whose rights are injuriously affected by a statute confessedly void, but who is not permitted to even call the court's attention to the invalidity of the act. We have the case of a court enforcing, over a party's protest, the provisions of a law *which it concedes is not a law.*

The question first to be determined is, whether or not the law is in violation of the Federal Constitution. If it is, it is void and of no effect. If

it is a void law it should not be given effect by any court; it should not be enforced against any person. It would be strange, indeed, if a void law could be enforced as to some persons injuriously affected by it, and not enforced as to others.

To properly comprehend the logical results following from such a construction of the law, let us suppose a case: A railroad company owns a large tract of land in the vicinity of a city of the first class. It concludes to utilize a portion of the land for raising vegetables for use in its eating houses and dining cars. The land is accordingly fenced off and one part of it is used by the company for agricultural purposes and the other portion is allowed to remain vacant and unused, awaiting the time when it will be needed for side tracks and shops. An ordinance is passed taking both pieces of land into the city under the act in question. The railroad company enjoins the enforcement of the ordinance upon the ground that the statute upon which the ordinance is based is unconstitutional. The court holds that the law is unconstitutional, and that the railroad company can raise the question so far as it relates to the land used for agricultural purposes, but can not do so in so far as it relates to the land held by it for railroad

purposes. The court thereupon adjudges that the one piece of land is in the city and that the other is not. Would such a judgment be in accordance with common sense or legal principles?

Again, let us suppose a case in which the statute in question is declared unconstitutional for the reasons given in this brief, in a suit brought by a corporation owning land used for agricultural purposes, and thereafter an attempt should be made to enforce the law against lands used for other purposes. Could it be asserted with any degree of candor in such a case, that the owner of the land should not be permitted to plead the unconstitutionality of the act on the ground that he was not affected by it? If the unconstitutionality of the law can be raised in such a case by the owner of lands not used for agricultural purposes, why can it not be done in the case at bar?

It is useless to tell a person that he is not affected by a law which he knows is being enforced against him, and which he is compelled to obey.

The Supreme Court of Kansas holds that the party complaining must be affected by the *discrimination* as well as by the statute. But the property of the Union Pacific Railway Company

is affected by the discrimination as well as by the statute. Suppose the distinction had simply been made between property used for agricultural purposes on the one hand, and all other classes of property on the other. Waiving any question as to the validity of such a discrimination, can it be said that the owner of property used for railroad purposes would not be *affected* by it? In other words, if the discrimination in favor of agricultural lands made the statute unconstitutional, would not railroad lands be *affected* by the act so as to enable the owner thereof (within the doctrine of the Supreme Court of Kansas) to plead and rely upon its unconstitutionality? If that is so, what, if anything, is there to prevent the owner of railroad property from assailing the validity of an act which is unconstitutional, because of a discrimination made in favor of agricultural lands *owned by individuals*, and against all other classes of property?

A demonstration of the fact that property held or used for railroad purposes is affected by the discrimination, is afforded by considering the practical workings of this law as to the lands described in the first paragraph of the act. It starts out by describing, first, unplatted lands which lie

upon or mainly within a city of the first class; second, unplatted lands so situated as to be bounded on three-fourths of its boundary line by platted territory of or adjacent to said city, or by the boundary line of such city, or by both. Such lands may be taken into the city by the mere passage of an ordinance; provided, however, they do not happen to be owned by an individual and used for agricultural purposes. The lands of the railway company are included within those enumerated in the statute, and by ordinance duly passed are brought within the city. So far the conclusion can not be avoided that the lands of the Union Pacific Railway Company have been affected by the statute.

Let us go a little further. John Jones owns an unplatted tract of land which lies upon and mainly within the city of Kansas City. It is also so located as to be bounded on three-fourths of its boundary line by platted territory of that city, and by three-fourths of the boundary line thereof. The land is used for agricultural purposes. The city desires to include this tract of land within its boundaries, but can not do it. An examination of the statute reveals the fact that lands owned by an individual and used for agricultural purposes

are not affected by it. Here, then, is an exemption of the land owned by John Jones from the provisions of the statute. The lands of the railroad company are taken into the city. The land owned by John Jones, although located precisely similar to that of the railway company, can not be touched. Does not this amount to a discrimination in favor of John Jones and against the railway company? And can it be said that the railroad company is not *affected* by the discrimination?

The Clause Excepting Agricultural Lands Owned by Individuals Can Not be Rejected, Leaving the Statute to Stand Without It. The Whole Act Must Fall.

It may be claimed that the exception should be disregarded and thus permit the act to stand. This can not be done without making a law which it was not the intention of the Legislature to pass. The whole act is made dependent upon the idea that it was not to affect agricultural lands owned by individuals. The act never would have passed the Legislature if such lands had been included. The exception was undoubtedly in the shape of an amendment offered by some member

who was seeking to protect the property of himself and his fellow farmers. The probabilities are that an amendment of this nature, which is so much out of harmony with the balance of the act, would never have been accepted by the friends of the measure if they had not been compelled to do so. The, exception, however, is there, and is so connected with the whole statute as to be inseparable from it. This being so, the whole statute must fall.

In the case of *Spraigue vs. Thompson*, 118 U. S. 90, a decision was made involving this precise question. In that case it appears that the code of Georgia contained the following provision:

"Any person, master, or commander of a ship or vessel bearing toward any of the ports or harbors of this State, *except coasters in this state, and between the ports of this State and those of South Carolina, and between the ports of this State and those of Florida*, who refuses to receive a pilot on board, shall be liable, on his arrival in such port in this State, to pay the first pilot who may have offered his services outside the bar and exhibited his license as a pilot, if demanded by the master, the full rates of pilotage established by law for such vessel."

It was held by this court that this provision of the Georgia code was in conflict with the Constitution of the United States and that it was

annulled and abrogated by the provision in the Revised Statutes, section 4237, which provides that—

"No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half-pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discriminations are annulled and abrogated."

The Georgia statute was declared void because it excepted from its operations coasters in the State of Georgia and coasters between the ports of Georgia and those of South Carolina and between the ports of Georgia and those of Florida. It was held, however, by the Supeme Court of Georgia, in the same case of *Sprague vs. Thompson* that so much of the section as made these illegal exceptions might be disregarded, so that the rest of the section as thus read might stand, upon the principle that the separable part of the statute which is unconstitutional may be rejected and the remainder preserved and enforced. But in reference to this decision of the Supreme Court of Georgia, this court, through Mr. Justice Matthews, decided as follows:

"But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia, the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of Sec. 1512 of the code of Geogia can not be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by Sec. 4237 of the Revised Statutes."

In the case of *Pollock vs. Farmers Loan & Trust Co.* (Income Tax Case), 158 U. S. 601, it was held by this court that so much of the sections of the income tax law as laid a tax on income from real and personal property was unconstitutional. The court then proceeded to discuss the question as to whether these particular sections could be eliminated from the statute so that the balance of it might stand. In reference to that matter this court, through Mr. Chief Justice Fuller, stated the law to be as follows (page 635):

"It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be re-

jected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven, inclusive, which relate to the subject which has been under discussion; and as to them we think the rule laid down by Chief Justice Shaw in *Warren vs. Charlestown*, 2 Gray, 84, is applicable, that if the different parts 'are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them.' Or, as the point is put by Mr. Justice Matthews in *Poindexter vs. Greenhow*, 114 U. S. 270, 304: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

An illustration of this same principle is found in the Trade Mark Cases, 100 U. S. 82, where an act of Congress, which, it was claimed, would have been valid as a regulation of commerce with foreign nations and among the States, was held

to be void altogether because it embraced all commerce, including that between the citizens of the same State, which was not within the jurisdiction of Congress, and its language could not be restrained to that which was subject to the control of Congress. "If we should," said the court in that case, page 99, "in the case before us undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do."

See, also, opinion of Mr. Justice Brewer in case of *C. B. U. P. R. R. Co. vs. A. T. & S. F. R. Co.*, 28 Kan. 454.

Warren et al. vs. Mayor, etc., 2 Gray 84.

Slauson vs. City of Racine, 13 Wis. 398.

Cooley's Constitutional Limitations, page 179.

Mesheimer vs. The State, 11 Ind. 482.

The Right of the Union Pacific Railway Company to Hold Lands Used for Agricultural Purposes.

It was urged with considerable force, by adverse counsel in the court below, that the Union Pacific Railway Company had no authority to hold lands used for agricultural purposes; from which premise it was sought to deduce the conclusion that plain-

tiffs could by no possibility be injured by the discrimination made in the statute between the owners of agricultural lands. In view of the argument already made this point would not seem to be very material, but it is so far from being in accordance with the law that we can not refrain from calling the court's attention to its incorrectness. Any railroad company is liable to have a surplus of ground which it holds for the necessities of a growing business. There is no reason why the company may not lease these lands to be used for agricultural purposes. Even though the railroad company may be holding land more than it should, its title to the land can not be disturbed except in a direct proceeding brought at the instance of the State. As long as the State does not interfere, the railroad company has the right to permit the use of its surplus lands for agricultural purposes.

Conceding that railroad companies generally have no right to permit their surplus lands to be used for agricultural purposes under any circumsances, still this rule could not be held to apply to the Union Pacific Railway Company, for this reason: The Union Pacific Company was granted large tracts of land by the United States to aid in

the construction of its railroad; at the time this suit was commenced it still owned many acres of these lands. They were valuable, principally, for agricultural purposes. In the disposition and management of this property it was essential that the company not only permit but encourage their use for agricultural purposes. In most instances the title to the property sold remained in the railway company until the purchase price was fully paid. In many cases, after the property was sold, it reverted to the railway company by reason of a failure to pay balances due on the purchase price. The company would thereupon lease the land and improvements until another purchaser could be found. All of this must have been within the contemplation of Congress when the grant of lands was made to the railway company, and the company was necessarily endowed with the powers which were essential to carry the terms of the grant into effect. As was said by this Court in the case of *Platt vs. Union Pacific Railroad Company*, 99 U. S. 58:

"Railroad companies are not usually empowered to hold lands other than those needed for roadway and stations or water privileges. But when they are authorized to acquire and hold lands separate from their roads, the authority must in-

clude the ordinary incidents of ownership—the right to sell or to mortgage. Especially is this so when, as in the present case, the lands have been granted to the company by the Legislature that granted the charter, *without any restriction of their use.*"

Respectfully submitted.

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